

**Responses and Replies**

*RCVD 7-21-12*

3:11-cv-01458-AC Lewis v.  
Federal Aviation Administration et  
al

*CR-39*

CONSENT

**U.S. District Court**

**District of Oregon**

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**Reply Defendant FFA's Reply In Support to Motion for Summary Judgment [28]. Filed by Federal Aviation Administration. (Danielson, Kevin)**

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF OREGON**

**PORTLAND DIVISION**

**JEFFREY NATHAN LEWIS,**

**Plaintiff,**

**v.**

**FEDERAL AVIATION  
ADMINISTRATION,**

**Defendants.**

**Civil No. 3:11-CV-1458-AC**

**DEFENDANT FAA'S REPLY IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

Defendant Federal Aviation Administration, by S. Amanda Marshall, United States Attorney for the District of Oregon, through Assistant U.S. Attorney Kevin Danielson, submits this reply memorandum in support of its motion for summary judgment.

### **Introduction**

Plaintiff Jeffrey Nathan Lewis has alleged the Federal Aviation Agency (“FAA”) violated the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, by wrongfully withholding information under Exemption 5 and by using a “pay-to-play” tactic when it withheld information under FOIA because it required him to pay exorbitant fees before it would release the requested information. CR 19, ¶¶ 4, 6.

In Plaintiff’s response to FAA’s motion for summary judgment, he argues the FAA is not entitled to summary judgment for the following reasons: (1) the FAA has acted in bad faith; (2) Exemption 3 does not apply to certain document; and (3) the FAA has obstructed his right to documents under FOIA with its pay-to-play tactics. CR 36, pp. 3-10.

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## Argument

### **I. Plaintiff has not presented any evidence the FAA acted in bad faith related to this action.**

Plaintiff argues the FAA has acted in bad faith in responding to his FOIA requests. As his first example of the FAA's bad faith, Plaintiff states the FAA took disciplinary actions against him but never provided him with the names of his accusers. CR 36, ¶ 9. However, Plaintiff explained that the names were eventually released to him on March 8, 2010, in response to a FOIA request. CR 37-1, p. 5.

As a second example of the FAA's bad faith, Plaintiff states that a copy of his badge photograph was not released to him as part of discovery in his proceedings with the Merit Systems Protection Board. CR 36, ¶ 10. Plaintiff added that he later received a copy of the document on March 13, 2010, in response to a FOIA request. CR 36, p. 12.

As a third example of the FAA's bad faith, Plaintiff states that he never received a copy of an email identified as "Email from Monique France – Line of Business – grid off of review letter." CR 36, ¶ 11. Plaintiff contends that he made several FOIA requests for this document and it has never been produced. *Id.*

Under FOIA, allegations that an agency acted in bad faith are generally related to whether the agency's search for documents was adequate or whether there was any evidence of bad faith by the agency in claiming an exemption. *Lahr v. NTSB*, 569 F.3d 964, 988 (9th Cir. 2009); *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). In the first two examples, Plaintiff eventually received the documents he requested and they do not

appear to be part of the FOIA requests before this Court. In the third example, it does not appear that the documents are part of the FOIA requests before this Court. Accordingly, Plaintiff's allegations of bad faith against the FAA do not prevent this Court from granting summary judgment on the actions before this Court.

**II. The FAA properly withheld documents under Exemption 5 based on the deliberative process privilege and the attorney-client privilege.**

Under Exemption 5, information can be withheld under the deliberative process privilege when the matter is predecisional and deliberative. *Lahr*, 569 F.3d at 979. The attorney-client privilege protects communications by in-house counsel with an employee seeking legal advice related to his duties. *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). Moreover, the attorney-client privilege covers communications by individual government employees with agency attorneys. *United States v. Ferrell*, 2007 WL 2220213 at \*2 (W.D. Wash. Aug. 1, 2007).

Plaintiff alleges the FAA improperly withheld part of three emails under Exemption 5 related to FOIA Request No. 2011-4258 and FOIA Request No. 2011-9148. Contrary to Plaintiff's allegations, Exemption 5 applied to the withheld information. The FAA has provided these documents to the Court for in camera review.

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1. FOIA Request No. 2011-4258.

The FAA withheld portions of two emails, one dated 7/08/2008 and one dated 7/07/2008, because they contained information that was protected under Exemption 5 based on the deliberative process privilege and the attorney-client privilege. Declaration of Jeb Kreischer, CR 30, ¶ 8; CR 30-1, pp. 15-16, 18-20. The emails discussed possible disciplinary action related to Plaintiff's employment at the FAA. Dec. of Kreischer, CR 30-1, p. 15-16; *Vaughn* index, CR 30-8, p. 2.

Here, the information was properly withheld under the deliberative process privilege because it was created during the course of Plaintiff's disciplinary action. The information precedes the decision on what disciplinary action to pursue and what penalty to assess and was produced in the course of the disciplinary decision process. The information was both predecisional and deliberative and is protected under Exemption 5 because it would expose the agency's decision-making process and disclosure of the information would undermine FAA's ability to perform its function. Accordingly, the FAA properly withheld the information under Exemption 5.

In addition, the information was also protected under Exemption 5 based on the attorney-client privilege. The emails were from Don Bobertz, an FAA attorney, and were conveyed to an employee in the Labor Relations, Training & Benefits Branch. The information was intended to be confidential and discussed litigation-sensitive advice

related to Plaintiff's possible removal. Accordingly, the information falls within the attorney-client privilege and is protected under Exemption 5.

2. FOIA Request No. 2011-9148.

Plaintiff requested an unredacted copy of an email dated April 5, 2008, with the subject line of "SFO Hot Issues." The FAA withheld two lines of information under Exemption 5. Dec. of Kreisler, CR 30-7, p. 10. The FAA withheld this information because it contained the manager's proposed recommendation and that information was both predecisional and deliberative. *Vaughn* index, CR 30-8, p. 3. The recommendation was not followed and adopted as the final agency action. *Id.* Release of this information would discourage the open and frank sharing of opinions between FAA employees in formulating personnel and disciplinary decisions. *Id.* Accordingly, the information is protected under Exemption 5 based on the deliberative process privilege.

**III. Plaintiff did not pay the search fees and failed to exhaust his administrative remedies.**

The FAA has argued that a civil action cannot be brought alleging a violation of FOIA unless the requester has exhausted his administrative remedies. *King v. U.S. Dept. of Justice*, 772 F. Supp. 2d 14, 18 (D.C. 2010). A failure to exhaust administrative remedies is treated as a failure to state a claim on which relief may be granted. *Id.* A FOIA requester has not exhausted his administrative remedies until the required fees are paid or the requester appeals the agency's refusal to waive the fees. *Id.*

Here, Plaintiff has failed to exhaust his administrative remedies by failing to pay the required search fees in FOIA Request No. 2010-3323, No. 2010-4091, No. 2010-5324, and No. 2011-6114. Dec. of Kreischer, CR 30, ¶¶ 9-11, 13; CR 30-2, pp. 25-26 fn.1; CR 30-3, p. 19, fn.2; CR 30-4, p. 8; CR 30-6, p. 3. In addition, Plaintiff withdrew his FOIA request in No. 2010-5390. CR 30-5, p. 6. Therefore, Plaintiff has failed to exhaust his administrative remedies and summary judgment should be granted in favor of the FAA.

Respectfully submitted this 20<sup>th</sup> day of July 2012.

S. AMANDA MARSHALL  
United States Attorney  
District of Oregon

/s/ Kevin C. Danielson  
KEVIN DANIELSON  
Assistant United States Attorney



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of **DEFENDANT FAA'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was sent by first-class mail and deposited in the United States Mail at Portland, Oregon, on July 20, 2012, addressed to:

Jeffrey Nathan Lewis  
28242 S. Salo Road  
Mulino, OR 97042

Plaintiff, *Pro Se*

  
/s/ Deanne Bateson  
DEANNE BATESON  
Legal Assistant

**CERTIFICATE OF SERVICE**